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No. 165.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

EVELYN LEADMAN, *Petitioner,*

vs.

THE GREYHOUND CORPORATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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EVELYN LEADMAN, *Petitioner,*

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THE GREYHOUND CORPORATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

IF THIS HONORABLE COURT PLEASE:

In a sincere belief that by its decision of February 4, 1955, the learned Court of Appeals of Kentucky, has deprived petitioner of a property right, without "due process of law," in violation of the "Due Process Clause" of the Federal Constitution, we respectfully submit this reply to respondent's brief in opposition to the writ, prayed for here.

(A) STATEMENT OF FACTS.

Evelyn Leadman resides in West Virginia. November 14, 1951, she purchased a ticket, at Lexington, Kentucky, destination Hazard, Kentucky, about 150 miles distant, and entrained on a bus belonging to respondent, for a journey to the last named place.

The bus reached Jackson, Kentucky, in good order, and resumed its run to Hazard. About three miles southeast from Jackson, the highway crosses Quicksand Creek, over a bridge. When this point was reached, the bus ran afoul the end of a steel bridge and turned over, permanently injuring petitioner, in the places and manner described in her complaint. She has never recovered from her injuries.

(B) THE BEGINNING AND END OF THE SUIT IN THE COURTS OF KENTUCKY AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

April 5, 1952, petitioner instituted action in the Circuit Court for Breathitt County, Kentucky, seeking recompense for her injuries (4),[1] against the Southeastern Greyhound Lines, and one Hamm, the operator in charge of the bus (1). When the answer of the Southeastern Greyhound Lines came in (11-12), it was to the effect that prior to the injury it had transferred all its assets, properties and franchises to the respondent. Hamm also answered (13-14), alleging that because of a slick section of the highway, the bus "skidded" and that the accident

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[1]Figures in parentheses refer to pages in the typewritten transcript filed with petition for certiorari.

was unavoidable. By amended petition (15-17). the Greyhound Corporation was brought in and thereafter participated in the trial of the case, using the same legal forces as represented the Southeastern Greyhound lines.

A trial of the case to a jury, resulted in a verdict for petitioner for $15,000.00 (41) against the Greyhound Corporation alone. This verdict was returned under instructions offered by respondent, to which there were no exceptions as follows (47):

"Instruction E."

> "You may find a verdict for the plaintiff against one of the defendants, and for the other, or you may find a verdict in one amount against one of the defendants, and a different amount against the other, or you may find a joint verdict against all of the defendants."

Judgment was entered on the verdict (41-42), and respondent moved the Court for a judgment in its favor (32). September 2, 1952, respondent filed in the United States District Court for the Eastern District of Kentucky its petition in Civil Action No. 151, against petitioner, the Clerk of the Breathitt Circuit Court, and petitioner's attorneys, seeking an injunction to prevent the enforcement of the judgment (111-115). The Federal Court denied the relief sought (112 F. Supp. 237). Then respondent went into the Court of Appeals of Kentucky, with the result of which petitioner here complains.

(C) THE QUESTIONS PRESENTED.

It seems to us that the record and circumstances of this case present for consideration the following questions:

1. Is a money judgment recovered by A, against B, a property right in A?

2. What is meant by "due process of law"?

3. Does the "due process clause" of the Fourteenth Amendment, protect one against arbitrary, capricious, improvident actions of State Courts, as well as from the same character of acts by state legislatures or executives?

3. If the highest Court in a state, fails and refuses to apply to the situation of a litigant before it, the settled rules laid down for the state by statute or decision, has the litigant been accorded "due process"?

4. Did the Court of Appeals of Kentucky fail or refuse to apply to petitioner and her case here, the prevailing rules it had established for like or similar situations?

(D) ARGUMENT.

I. (a) A judgment in favor of A, against B for money, invests A with a property right in the money adjudged.

(a) 12 Am. Jur., p. 348.

(b) Collins v. Welch, 75 F. 2d 894, 99 A. L. R. 1319, cert. den. 295 U. S. 762, 55 Sup. Ct. Rep. 921, 79 L. Ed. 1764.

(b) And such a right is protected by the "due process" clause of the Fourteenth Amendment.

(a) Cases cited supra.

In 12 Am. Jur., p. 348, it is said:

> "Rights acquired by a judgment are property rights which can not be taken without violation of the guaranty against due process.

II. What is meant by "Due Process of Law"?

(a) Stubbs, Germany in the Middle Ages, pp. 146-147.

(b) McKechnie, Magna Carta, Art. 39, p. 375.

(c) U. S. Const., Amendments 5 and 14.

(d) Ky. Const., Sec. 14.

We have no desire to be or appear pedantic, but this inquiry seems to be dictated by a requirement for logical presentation.

In 1037, in the 13th year of the reign of Conrad II, and in his first canon, we find, what we think is the first use of a phrase that foretells the concept of due process. The idea was there expressed as "The law of the Empire." In 1215, in its 39th Article, Magna Carta expresses the same idea in the phrase "the law of the land." In the Fifth and Fourteenth Amendments to the Federal Constitution it is referred to as "Due Process of Law," and in the Kentucky Constitution of 1891, Sec. 14, as "due course of law."

From all these different expressions of an underlying concept, it would seem that where a state through the highest Court, has laid down, by decision, rules to be applied to all cases that present like or similar aspects, it has charted the path of due process for the state.

III. The due process clause of the Fourteenth Amendment, guards against encroachment by either arm of the state government on the lives, liberties and properties of all citizens of the state.

(a) Shelly v. Kraemer, 334 U. S. 1, 68 Sup. Ct. Rep. 826, 92 L. Ed. 1161.

In Shelly v. Kraemer, 334 U. S. 1, 68 Sup. Ct. Rep. 826, 92 L. Ed. 1161, this Court, through Chief Justice

Vinson, has said that the Fourteenth Amendment, in its due process and equal protection clauses, guarded against the acts of the judiciary as well as against the acts of the legislative and executive branches of government, and that its commands are not restricted to situations where judicial proceedings were found to be procedurally unfair, but also to actions of state Courts in applying to a substantive common law, right, applicable principles which had been laid down by the Courts of the state, in such a way as to violate the guaranties of due process and equal protection clauses.

IV. It would seem therefore, to follow, ineluctably, that if the Court of Appeals of Kentucky, in this case, refused to apply rules that it has formulated for application to like or similar situations, petitioner has been denied due process. She may also have been denied the protection of equal laws.

Very little argument is needed on this point. The question developed in the next section of this brief, will establish whether the Court observed its own rules. It will also develop the fact that the cases cited by the Court in support of its opinion, have no application here, and do not touch the question presented.

V. Did the Court of Appeals of Kentucky, in this case, fail to apply to the situation presented, the substantive law of the state, which it had formulated for the resolution of like or similar situations? We say it did.

(a) Bowling Green-Hopkinsville Bus Company v. Adams, 261 S. W. 2d 14.

The Federal question in this case, was first brought to the attention of the Court of Appeals of Kentucky, in petitioner's petition for rehearing. And the Court modified its opinion with this observation:

> "The appellee has asserted that a reversal of this judgment, upon what appellee calls a 'technicality' would result in depriving her of property rights without due process of law in violation of the 14th Amendment to the Constitution of the United States. **We find no merit in this contention.**"

Just as easy as that. Without examination, and in utter disregard of the Court's own substantive rule announced in the case cited in the headnote.

As fortifying its abbreviated decision the Court cites, and respondent here relies on (a) Illinois Central Railway Company v. Applegate, 268 Ky. 458, 105 S. W. 2d 938, and (b) Lewis v. Devasher, 267 S. W. 2d 938. It will be found that neither of these cases support the rule that the Court of Appeals of Kentucky applied here.

It is to be noted there were three defendants named in this case. One of them went out and another—the respondent—took its place (See opinion of Judge Ford, 112 F. Supp. 237). Respondent owned the bus and was master; Hamm was its operator, or driver, and respondent's servant. He was charged with just two things in the operation of the bus: (a) to collect the fares, and (b) to operate the bus in such manner as that all passengers would have safe conduct. The vital issue was: Was the bus so operated by respondent's servant?

The Court remembers the instruction under which the jury returned a verdict against respondent alone (Ante p. 3). The verdict was one the jury, under that instruction could legally return.

Respondent says that petitioner can not have advantage of the judgment rendered on the verdict, because the jury did not find against the master's servant; and relies for authority on the two cases mentioned supra. We will now briefly examine those cases:

In the Applegate case, 268 Ky. 458, 105 S. W. 2d 153, the Court first took up the theory of earlier cases that recovery against a master rested upon a doctrine that the master and his servant, in case of a suable injury, were joint tort feasors. That theory had been advanced in Illinois Central Railroad Company v. Murphy, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352 and was followed in a long line of cases, cited by the Court in the Applegate case. The Court exploded that theory, which was manifestly unsound, and announced the correct theory of the master's liability, on the doctrine of respondeat superior, from which came the notion, that in no case could there be a finding and judgment against the master, unless there was a finding of negligence on the part of the servant.

In Lewis v. Devasher, 267 S. W. 2d 938, the jury completely absolved the servant of negligence, thus:

> "Mitchell Lewis was the agent of Bessie Lewis. The jury returned a verdict finding Mitchell not guilty of negligence in operating the automobile" (S. W. Cit. 939).

Therefore there could be no verdict for damages solely against the master, since under the doctrine of respondeat superior, the master was required only to answer for the servant's negligence, if any.

Those two cases therefore have no application to the case at bar.

But the rule was laid down by the Court, in Bowling Green-Hopkinsville Bus Company v. Adams, 261 S. W. 2d 14, at 16,[2] through Judge Duncan:

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[2]In that case the same counsel who represent respondent here represented appellant there. They here are silent about the Adams case as was the Court of Appeals.

"The rationale of the Farney and Harkleroad cases was that a failure to make a finding against the servants evidence an intention on the part of the jury to find in their favor under the facts presented in those cases. These opinions do not establish the invariable rule that in every case, and under all circumstances, the failure to specifically find against the servant will be regarded as an affirmative finding in his favor. The problem is merely one of determining the intention of the jury as indicated by the verdict. In interpreting the verdict it is entirely proper to consider the instructions under which the verdict was returned. A consideration of the instructions given here makes it abundantly clear that the jury did not intend a verdict in favor of the driver. On the contrary we think the verdict, fairly interpreted, amounted to a finding against the driver.

And then (S. W. cit. 16), proceeds to relate the instruction under which the verdict was returned:

"The Court by instruction 8 informed the jury that it might find a verdict for each of the plaintiffs against all of the defendants, or against any one or more of the defendants, or that it might find against one defendant, and in favor of another, or if the finding was against more than one defendant, it might fix damages in different sums against each defendant. The concluding paragraph of this instruction was as follows: And for the purposes of this instruction, Mota E. Young and Bowling Green-Hopkinsville Bus Company, Inc., are to be considered one defendant.

In the instant case, the jury was hearing a description of an event, that took place in the vicinage. It was acquainted with the highway and the bridge; it knew as all reasonable men must have known, that if the bus were carefully guided, and was being operated carefully, having regard to the road conditions, it would not have collided with the end of a steel bridge, and tried to climb

it, and then turn over. It also knew that a verdict against the bus driver would be a useless manifestation, but that the master was able to respond in damages for the injury caused to petitioner. Under the instruction "E" (47), given at respondent's instance the jury could have the verdict which it did. Hence the rule that the Court should have made some effort to interpret the intention of the jury, instead of applying a hard and fast rule and should have observed the Adams case supra.

(E) CONCLUSION.

We respectfully submit our application for certiorari to the Court, asking that the writ be granted.

Cleon K. Calvert

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Pineville, Kentucky,

August 31, 1955.

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EVELYN LEADMAN, *Petitioner,*

vs.

THE GREYHOUND CORPORATION,
Respondent.

PETITIONER'S PETITION FOR REHEARING.

IF THIS HONORABLE COURT PLEASE:

October 10, 1955, the Court denied certiorari in this case. A good faith conviction on our part, impels us to file this application for a re-consideration of that ruling.

(A) The Facts.

All pertinent facts are stated by us in our Reply to Respondent's Brief in Opposition, and on page 2 thereof. Our complaint here is that we have been denied *"Due Process,"* through the way and manner the Court of Appeals of Kentucky, dealt with the application of the law of Kentucky, to the facts, and to the verdict of the jury, and the judgment rendered in petitioner's favor.

(B) With Reference to This Case What Was "Due Process"?

It is our view that if a rule of law has been established in Kentucky, either through statute or decision, and the highest court in Kentucky, in considering a case before it, refuses to apply that rule, but relies on cases perfectly inapposite then *"due process"* has been denied. That, in our opinion is the yardstick that must govern this case.

(C) What Was and Is the Law of Kentucky, That the Court of Appeals of Kentucky Refused to Follow and Apply?

The law of Kentucky, respecting the interpretation of jury verdicts, in cases like this is set down in *Bowling Green-Hopkinsville Bus Company* v. *Adams,* (Ky.) 261 S. W. 2d 14. That rule, in brief, is that a verdict of a properly instructed jury is to be given effect, according as the intention of the jury is to appear on a consideration of the instructions of the Court, the facts produced, and the verdict itself. That is the rule applied in the *Adams* case, *supra.*

(D) Refusing to Apply the Rule in the Adams Case, the Court Relied On Two Cases That Had No Bearing on the Instant Case.

The Court, although its attention was specifically directed to the *Adams* case, *supra,* cited as authority for reversing the judgment of the Circuit Court, to cases that had no bearing, in any degree, on the problem before it. These two cases are discussed and analyzed in our reply to respondent's brief, and on pages 7 and 8 thereof, and following that discussion are excerpts from the *Adams* case, *supra.*

Since all these things are set down in our reply brief we will not repeat them here, for the Court may find them there with no trouble.

(E) Conclusion.

We think we are entitled to have the order of October 10, 1955, denying certiorari re-considered and re-heard. And we think we are entitled to the granting of the writ.

These measures we respectfully ask.

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Attorney for Petitioner.

Pineville, Kentucky,
November 16, 1955.

Certificate of Counsel.

The undersigned Counsel for Petitioner certifies to the Court that this petition for re-hearing is filed in good faith and not for purposes of delay; and that it is confined to what counsel considers substantial grounds for rehearing.

Two copies of this petition for rehearing have been forwarded by mail to Messrs. Stoll, Keenon & Park, Attorneys for Respondent, at 310 First National Bank Building, Lexington, Kentucky, which is their address.

This November ____, 1955.

_____,
CLEON K. CALVERT,
Asher Building,
Pineville, Kentucky.